



IT IS SO ORDERED.
Signed October 18, 2013

A handwritten signature in cursive script, reading "Arthur S. Weissbrodt", is written over a horizontal line.

Arthur S. Weissbrodt
U.S. Bankruptcy

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re]	Case No. 13-50430-ASW
DENNIS RONALD DI RICCO,]	Chapter 7
Debtor.]	
<hr/>		
TISHA S. EFTHYMIU,]	Adv. Pro. No. 13-05060-ASW
Plaintiff,]	
v.]	
DENNIS RONALD DI RICCO,]	
Defendant.]	

**TENTATIVE DECISION AND ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS WITH LEAVE TO AMEND**

Before the Court is the motion of Defendant Dennis Donald Di Ricco, represented by attorney Stephen Finestone, to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6), applicable in bankruptcy via Fed. R. Bankr. P. 7012. Plaintiff Tisha Efthymiou, who is represented by attorney Cheryl Rouse, opposes the motion.

1 Defendant previously moved to dismiss Plaintiff's second and
2 third causes of action under §§ 523(a)(4) and (a)(6). Plaintiff
3 did not oppose the motion, and the Court dismissed those claims.
4 Plaintiff filed a First Amended Complaint ("FAC") on August 12,
5 2013, pleading only one claim under § 523(a)(2)(A). Defendant now
6 moves to dismiss that claim for failure to state a claim upon which
7 relief can be granted and for failure to state a fraud claim with
8 particularity under Fed. R. Civ. P. 9(b).

9 Under Fed. R. Civ. P. 12(b)(6) (applicable in bankruptcy via
10 Fed. R. Bankr. P. 7012), a court must dismiss a complaint if it
11 fails to state a claim upon which relief can be granted. To
12 survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the plaintiff
13 must allege "enough facts to state a claim to relief that is
14 plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S.
15 544, 570 (2007). This standard requires the plaintiff to allege
16 facts that add up to "more than a sheer possibility that a
17 defendant has acted unlawfully." Ashcroft v. Iqbal, 556 U.S. 662,
18 678 (2009). Plaintiff must provide "more than labels and
19 conclusions, and a formulaic recitation of the elements of a cause
20 of action will not do." Id.

21 In deciding whether the plaintiff has stated a claim upon
22 which relief can be granted, the Court must assume that the
23 plaintiff's allegations are true and must draw all reasonable
24 inferences in favor of the nonmoving party. Usher v. City of Los
25 Angeles, 828 F.2d 556, 561 (9th Cir. 1987).

26 Section 523(a) excepts from discharge any debt:

27 (2) for money, property, services, or an extension,
28 renewal, or refinancing of credit, to the extent obtained
by--

(A) false pretenses, a false representation, or

1 actual fraud, other than a statement respecting the
2 debtor's or an insider's financial condition;

3 To plead a claim under § 523(a)(2)(A), the creditor must
4 allege that

- 5 (1) the debtor made a representation
6 (2) the debtor knew the representation was false at the
7 time he or she made it
8 (3) the debtor made the representation with the intent to
9 deceive
10 (4) the creditor justifiably relied on the
11 representation, and
12 (5) the creditor sustained damage as a proximate result
13 of the misrepresentation having been made.

14 In re Mbunda, 484 B.R. 344, 350 (9th Cir. BAP 2012) (citation
15 omitted). A debtor's failure to disclose material facts
16 constitutes a fraudulent omission under § 523(a)(2)(A) if the
17 debtor was under a duty to disclose and possessed an intent to
18 deceive. In re Apte, 96 F.3d 1319, 1322 (9th Cir. 1996.)

19 When pleading these elements, the plaintiff must state "with
20 particularity the circumstances constituting fraud or mistake.
21 Malice, intent, knowledge, and other conditions of a person's mind
22 may be alleged generally." Fed. R. Civ. P. 9(b).

23 The FAC alleges that Defendant was the plaintiff's investment
24 advisor and accountant. The FAC further alleges that William R.
25 Michael ("Michael") was a principal in Lancaster Capital
26 Management, L.L.C. ("Lancaster"), and that Lancaster was and is a
27 limited liability company engaged in the business of investing
28 other people's funds. Defendant, Michael, and Lancaster are co-
defendants in the state court proceeding Tisha A. Efthymiou v.
William R. Michael, Lancaster Capital Management, LLC, Dennis R. Di
Ricco, and Does 1-60, Case No. 111CV204158, pending in Santa Clara
County Superior Court.

1 The FAC further alleges that before October 2007, Plaintiff
2 was seeking long term capital gains to offset long term capital
3 losses to provide financial security for Plaintiff, and that
4 Plaintiff retained Defendant as Plaintiff's financial advisor and
5 accountant.

6 Plaintiff met with Defendant and Michael in October 2007 to
7 discuss the possibility of Plaintiff investing with Lancaster
8 through Michael to invest funds in the foreign exchange market
9 ("FOREX"). During the meeting, Michael stated that Lancaster's LCM
10 Gold Fund had been returning an annual profit of 36% with the
11 result that the investors would receive between 12% and 24% return
12 depending on the amount of the investment. Lancaster would only
13 charge a fee if the Lancaster LCM Gold Fund produced a return of
14 18% per year. Neither Defendant nor Michael provided Plaintiff
15 with adequate written documentation to support these
16 representations, nor did Defendant ask for these records or explain
17 to Plaintiff the risks of relying on summaries.

18 Based on the foregoing representations, in January 2008,
19 Plaintiff agreed to invest in Lancaster's LCM Gold Fund. Michael
20 orally agreed to a return of 24% per year payable at 2% each month
21 with a catch-up provision. If the return was greater than 24%,
22 Lancaster would keep it. If less, Lancaster would receive nothing.
23 The oral agreement also had a loss cap provision that if at any
24 time 20 percent of the principal was lost by Lancaster, all
25 investment activity would cease and Plaintiff would be notified.
26 Plaintiff had the right to full or partial liquidation upon 30
27 days' notice. Defendant attended the meeting but did not warn
28 Plaintiff about Lancaster or Michael and made no mention of the

1 risks inherent in such an investment. Plaintiff alleges Defendant
2 sent multiple emails to Plaintiff encouraging her to invest with
3 Lancaster. Despite promises of written contracts, no such
4 contracts were ever presented to Plaintiff by Lancaster, Michael,
5 or Defendant.

6 On February 1, 2008, Plaintiff transferred \$750,000 to
7 Lancaster with specific instructions by Plaintiff and Defendant
8 that the investments were to be used only for FOREX trading.
9 However, unbeknownst to Plaintiff, Michael transferred \$150,000.00
10 of Plaintiff's money to pay off a previous investment made with
11 Michael's partner, Bruce Musgrave, in an investment unrelated to
12 Plaintiff.

13 Beginning in March 2008, Plaintiff received monthly transfers
14 into her account from Lancaster equal to a 2% monthly return on her
15 principal, totaling \$162,000.00. Because of this apparent success,
16 Plaintiff invested another \$480,000.00 in October of 2008, \$530,000
17 in November 2008, and \$70,000 in April 2009.

18 Michael loaned all of Plaintiff's remaining funds to Lancaster
19 Platinum Growth Fund ("LPGF"), a hedge fund operated by Lancaster
20 and Michael. LPGF invested in and traded futures, purchased stock
21 options and invested in Icon, Taurus and EIMT. LPGF also loaned
22 \$250,000 of Plaintiff's investment to Enviromatix of California,
23 Inc., a company on which Defendant serves as a registered agent and
24 as a member of the board of directors. Plaintiff alleges Defendant
25 had a financial interest in the company.

26 Furthermore, LPGF loaned \$180,000.00 of Plaintiff's investment
27 to Cyrotherm of California, inc., a company for which Defendant
28 serves as president and as a member of the board of directors, and

1 in which Plaintiff alleges Defendant has a financial interest.
2 Plaintiff also alleges that Defendant knew of these loans but did
3 not disclose the information to Plaintiff.

4 LPGF made a final investment of Plaintiff's money to Art Loan
5 Financial Services, Inc. in the amount of \$500,000.00. Michael
6 served on the board of directors of Art Loan Financial Services.
7 Plaintiff alleges she had neither given consent to these
8 investments, nor did she have knowledge of these investments.

9 Between February 2008 and July 2009, Michael and Defendant
10 gave oral and written assurances to Plaintiff that her funds were
11 invested in the FOREX market and were doing well. Michael knew
12 this was false. No later than March 2008, Defendant became aware
13 that Plaintiff's money had been placed with LPGF instead of being
14 traded in the FOREX market in LCM Gold, and that it had incurred
15 financial losses. Defendant did not inform Plaintiff. Plaintiff
16 alleges that Defendant advised Michael and Lancaster to keep secret
17 from Plaintiff the fact that her funds had not been invested in the
18 FOREX market or that Plaintiff had sustained substantial losses.
19 Instead, Defendant advised Michael to continue to make monthly
20 payments to Plaintiff. Defendant and Michael did not admit to
21 Plaintiff that her funds had been transferred to the LPGF hedge
22 fund until October of 2010.

23 Plaintiff learned for the first time in July 2009 that her
24 funds had not been invested in FOREX trading but had been loaned to
25 LPGF and that there had been a significant loss of funds - in
26 excess of the 20% loss cap - going back a significant period of
27 time. All Plaintiff's funds had either been lost or were committed
28

1 to troubled, illiquid investments and as a practical matter were
2 lost.

3 Plaintiff was paid \$3,300.00 each month from August 2009-May
4 2010. After May 2010, Plaintiff received nothing. In January
5 2010, Plaintiff and Defendant met with Michael to audit the books
6 and records concerning Plaintiff's investment. The audit confirmed
7 that Plaintiff's funds had not been traded in the FOREX market but
8 had been utilized by Michael as alleged above.

9 Plaintiff's allegations that are specific to the
10 § 523(a)(2)(A) claim are as follows:

11 21. In advising the Plaintiff to invest with Michael
12 and Lancaster, Di Ricco concealed that such a promised
13 return on FOREX trading was unlikely, that he had not and
14 would not review Lancaster's records to confirm that it
15 was generating or would generate the returns promised by
16 Michael and Lancaster, that agreements should be in
17 writing, and beginning no later than March, 2008
18 concealed from the Plaintiff that Lancaster had given the
19 money to LPGF a hedge fund that had made questionable
20 loans and investments and that Plaintiff was not making
21 money as indicated in the monthly payments she was
22 receiving, but in fact was losing money. Di Ricco
23 concealed that he had a financial interest in two of the
24 companies to which loans were made by LPGF. Michael
25 concealed that he had a financial interest in one of the
26 companies to which a loan was made by LPGF.

27 22. The facts represented and the facts concealed
28 were material. Plaintiff reasonably believed the facts as
represented to her as true. If the true facts had not
been concealed from her, Plaintiff would not have
invested her funds with Michael and Lancaster, would have
diversified, would have monitored the investments, and
would have pulled out her remaining investment, all to
her damage as herein alleged.

23 23. As a direct and legal result of the fraudulent
24 concealment by Di Ricco, Plaintiff has been damaged in
25 the sum of not less than \$2,349,000 representing her net
26 principal investment, as well as pre-judgment interest at
27 the rate of 10 percent per annum from January 1, 2009 to
28 the present.

24 24. In addition, with respect to the representations
25 made by Di Ricco, he knew them to be false and made these
26 representations with the intention to induce Plaintiff to

1 act in reliance on these representations in the manner
2 hereafter alleged, or with the expectation that Plaintiff
3 would so act. Di Ricco also ratified and approved the
false representations made by Michael.

4 25. Plaintiff, at the time these representations
5 were made by and at the time Plaintiff took the actions
6 herein alleged, was ignorant of the falsity of the
representations and believed them to be true. In reliance
on these representations, Plaintiff was induced to invest
the sum of \$1,830,000 in Lancaster.

7 26. Had Plaintiff known the actual facts, she would
8 not have taken such action. Plaintiff's reliance on Di
9 Ricco's representations was justified because of Di
Ricco's role as her accountant and financial advisor.

10 Defendant argues that the only affirmative representation
11 alleged is that between February 2008 and July 2009 Defendant
12 assured Plaintiff that her funds were invested in the FOREX market
13 and were doing well. Plaintiff alleges that this allegation is not
14 pleaded with particularity as required by Fed. R. Civ. P. 9(f).

15 To satisfy Fed. R. Civ. P. 9, a complaint should plead the
16 who, what, where, when, why and how. Cooper v. Pickett, 137 F.3d
17 616, 627 (9th Cir. 1995). The complaint also must identify "the
18 circumstances of the alleged fraud so that defendants can prepare
19 an adequate answer." Id. (citing Warshaw v. Xoma Corp., 74 F.3d
20 955, 959-60 (9th Cir. 1996)). Defendant is correct that the
21 allegation does not meet the Fed. R. Civ. P. 9 standard. Although
22 the who and what are stated clearly, there is no allegation of the
23 precise time, place or reason for the representations. Further,
24 Defendant correctly points out that to the extent the
25 representations were made after Plaintiff made her final
26 investment, those representations cannot be a basis for an
27 allegation that Plaintiff was induced by those representations into
28 investing more funds.

1 Defendant acknowledges that fraudulent concealment may form a
2 basis for a claim under § 523(a)(2)(A) but argues that the
3 complaint still does not state a claim upon which relief can be
4 granted. First, Plaintiff alleges that Defendant concealed that
5 the promised returns on FOREX trading were unlikely. However,
6 there is no allegation that Defendant knew that this was the case.
7 Second, Plaintiff alleges that Defendant concealed that he had not
8 and would not review Lancaster's records to confirm that it was
9 generating or would generate the returns promised by Michael and
10 Lancaster. Here, there is no allegation that Defendant had a duty
11 to perform such a review or that a failure to do so was more than
12 mere negligence. Third, Plaintiff alleges that Defendant concealed
13 that agreements between Plaintiff and Lancaster should be in
14 writing. Again, there is no allegation that Defendant had a duty
15 to inform Plaintiff of this or that failure to do so was anything
16 but negligent.

17 Fourth, Plaintiff alleges that Defendant concealed from
18 Plaintiff that Lancaster had given the money to LPGF, a hedge fund
19 that had made questionable loans and investments, and Plaintiff was
20 not making money as indicated in the monthly payments she was
21 receiving, but was in fact losing money. Defendant argues that the
22 allegation is unclear, but when read in conjunction with the
23 allegation that Defendant knew no later than March 2008 that
24 Plaintiff's money had been placed with LPGF, the Court finds that
25 the allegation is sufficient to support elements one and two - that
26 the Defendant made a representation that he knew to be false.

27 Finally, Plaintiff alleges that Defendant concealed that he
28 had a financial interest in two of the companies to which loans

1 were made by LPGF. Defendant argues that this allegation is
2 insufficient because it does not state when the alleged loans were
3 made or when Defendant learned of the loans. In his reply
4 Defendant also argues that the corporations to which the loans were
5 made were not incorporated until 2009, after Plaintiff had made her
6 investments, although the Court does not find this dispositive.

7 The Court finds that this allegation is not pleaded with
8 particularity and thus does not support a claim under
9 § 523(a)(2)(A). As argued by Defendant, there is no allegation as
10 to when the loans were made or when Defendant learned of those
11 loans.

12 The Court also finds that there is no allegation that
13 Defendant acted with the requisite intent to deceive. The FAC
14 alleges that Defendant made the representations with the intent to
15 induce Plaintiff to act in reliance on these representations, but
16 does not explicitly state that Defendant acted with intent to
17 deceive.

18 For the foregoing reasons, the motion to dismiss is granted,
19 with leave to amend.

20 IT IS SO ORDERED.

21 *** END OF TENTATIVE DECISION AND ORDER ***
22
23
24
25
26
27
28

Court Service List

All parties are ECF participants